BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

THOMAS L. REMMENGA, JR.	)	
Claimant	)	
VS.	)	
	)	Docket No. 237,147
TECHNICAL IRRIGATION SERVICE	)	
Respondent	)	
AND	)	
	)	
UNION INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and Union Insurance Company appealed the May 4, 2004 Award entered by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on August 10, 2004.

APPEARANCES

Henry A. Goertz of Elkhart, Indiana, appeared for claimant. Nathan Burghart of Topeka, Kansas, appeared for respondent and Union Insurance Company (Union). Richard J. Liby of Wichita, Kansas, appeared for respondent and Hartford Accident & Indemnity (Hartford).[1]

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. Moreover, the parties announced there was no longer an issue regarding the amounts Hartford and Union had paid claimant following the June 2, 1998 incident as the amounts reported at the regular hearing and used by the Judge in the May 4, 2004 Award were accurate.

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[1] The Judge did not consolidate this claim with an earlier docketed claim in which claimant received workers compensation benefits from respondent and Hartford for a July 1996 accident and resulting back injury. Nonetheless, the Judge ruled Hartford could participate in this proceeding to argue why Union should be liable for any benefits arising from this claim. See R.H. Trans. at 56-57.

ISSUES

This is a claim for a June 2, 1998 accident. In the May 4, 2004 Award, Judge Fuller determined claimant had sustained a new accident on June 2, 1998, which entitled him to receive workers compensation benefits from respondent and Union. The Judge determined claimant had a 32.5 percent permanent partial general disability for the period from March 24, 1999, through April 30,1999, followed by a 50 percent permanent partial general disability from May 1, 1999, through January 2, 2000, followed by a 14 percent permanent partial general disability from January 3, 2000, through February 11, 2001, followed by a permanent total disability.

Union contends Judge Fuller erred. Union argues on page 19 of its brief to the Board that the June 2, 1998 incident and "claimant's current problems are nothing more than a continuing disability resulting from a complication of the failed surgery following" a July 1996 accident and, therefore, Hartford should be responsible for this claim. Union also argues that claimant had a 25 percent whole body functional impairment before the alleged June 2, 1998 accident and, therefore, any award granted claimant should be reduced due to that impairment.

Moreover, Union argues the hardware in claimant's back would have failed eventually and, therefore, claimant would have eventually sustained the same disability that he has now. Union contends the Judge erred by ordering it to reimburse Hartford for the medical expenses and temporary total disability benefits that Hartford paid after the June 2, 1998 incident. In addition, Union challenges the Judge's authority and this Board's authority to order Union to reimburse Hartford. In short, Union requests the Board to modify the May 4, 2004 Award and absolve it of all liability in this claim.

Hartford, on the other hand, argues the Judge was correct in assessing liability against Union. Hartford contends the evidence is overwhelming that claimant sustained a new accident on June 2, 1998, which permanently aggravated or injured his back. Accordingly, Hartford contends the Board should affirm the Judge in ordering Union to provide claimant's workers compensation benefits and in ordering Union to reimburse Hartford for the medical expense and temporary total disability benefits that it paid claimant after June 2, 1998.

Finally, claimant contends the Board should affirm the May 4, 2004 Award. Claimant argues respondent and its insurance carriers have failed to prove they are entitled to any credit or offset in this claim.

The issues before the Board on this appeal are:

1. Are the medical records attached to the preliminary hearing transcripts part of the record for purposes of final award? And are the documents attached to Hartford's submission letter to the Judge and the documents attached to claimant's brief to the Board part of the record for purposes of this award?

2. Did claimant sustain a new and separate accident on June 2, 1998, which arose out of and in the course of his employment with respondent, or were claimant's increased back symptoms the natural and probable consequence of a July 1996 accident?

3. What injury and disability, if any, did claimant sustain as a result of the June 2, 1998 incident?

4. If claimant is entitled to receive permanent disability benefits, should claimant's award be reduced due to a preexisting functional impairment under K.S.A. 1997 Supp. 44-501(c)?

5. Did the Judge err by ordering Union to reimburse Hartford for the medical expenses and temporary total disability benefits it paid to claimant after the June 2, 1998 incident?

It is noted the parties are not challenging the Judge's findings regarding permanent partial general disability and permanent total disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record and considered the parties' arguments, the Board finds and concludes:

Claimant commenced working for respondent in February 1994. On June 2, 1998, claimant injured his back while digging footings for an irrigation pivot pad. Due to extreme back pain and numbness in his legs, claimant was unable to continue working and was immediately taken to respondent's business office where he reported the injury.

But this was not the first time that claimant had injured his back. In July 1996, claimant was in a truck accident and sustained a burst fracture of his L1 vertebra. After that accident, Dr. Kris D. Lewonowski of Wichita, Kansas, reconstructed claimant's L1 vertebra. In October 1996, claimant returned to work doing light duty. And in June 1997, Dr. Lewonowski released claimant from treatment with no restrictions.

Claimant's symptoms did not completely resolve following the 1996 back surgery. But claimant's chronic symptoms were manageable and he returned to his regular job

duties of repairing and constructing pivot irrigation systems, which he performed until the June 2, 1998 accident.

Claimant returned to Dr. Lewonowski following the June 1998 incident and saw the doctor on June 9, 1998. The doctor took x-rays, which indicated claimant had a pedicle fracture of the L2 vertebra. The x-rays also showed that two of the screws that the doctor had used in claimant's 1996 back surgery were broken. But Dr. Lewonowski admits he initially missed seeing that. Consequently, Dr. Lewonowski prescribed conservative medical treatment.

Following the July 1996 accident, claimant experienced some bowel and bladder problems, which resolved. However, those symptoms immediately reemerged after the June 1998 accident and did not resolve despite Dr. Lewonowski's conservative medical treatment. Because of ongoing urinary and sexual dysfunction problems, approximately one year after the June 1998 accident Dr. Lewonowski referred claimant to a urologist, who took additional x-rays and discovered the broken screws in claimant's back.

Claimant then returned to Dr. Lewonowski who determined claimant needed another back surgery, which was performed in August 1999. During that second surgery, Dr. Lewonowski discovered the 1996 fusion he attempted did not fully mend. The doctor also found that a large portion of bone was indenting claimant's spinal cord.

In April 2000, Dr. Lewonowski released claimant from medical treatment. Unfortunately, claimant did not recover to the same degree that he did following his first back surgery.

Claimant has performed only limited work following his August 1999 surgery. Claimant worked in the offices of Teeter Irrigation, who had employed claimant's former boss, from January 2000 through February 11, 2001. At that time, claimant was terminated for missing work due to ongoing back pain. Claimant has not worked anywhere since that time. In May 2001, however, claimant moved to Nebraska and in approximately September or October 2001 he began receiving Social Security disability benefits. Claimant has not applied for any other employment since he began receiving his disability benefits.

Claimant has experienced ongoing symptoms since the June 1998 incident and August 1999 surgery. As of November 2003, claimant was continuing to receive medications as prescribed by Dr. Philip R. Mills.

1. Are the medical records attached to the preliminary hearing transcripts part of the record for purposes of final award? And are the documents attached

to Hartford's submission letter to the Judge and the documents attached to claimant's brief to the Board part of the record for purposes of this award?

The parties held several preliminary and motion hearings in this claim. At those hearings, the parties introduced medical records, which were attached to the transcripts. At the regular hearing, the parties agreed the preliminary hearings should be considered by the Judge for purposes of determining the final award. The parties, however, did not discuss at the regular hearing whether the medical records introduced at those preliminary hearings should be included as part of the record for purposes of final award. At oral argument before this Board, the parties could not agree whether or not those medical records were part of the evidentiary record.

K.A.R. 51-3-5a provides that medical reports and records shall be considered by the judge at a preliminary hearing. But the regulation also prohibits those same documents from being considered part of the record for the purposes of final award, unless the parties otherwise agree and stipulate.

Because the parties did not agree the various medical reports and records that were introduced at the preliminary hearings should be considered for purposes of the final award, those documents are not part of the evidentiary record for purposes of the final award.

Likewise, any documents that the parties attached either to their submission letter to the Judge or to their brief to this Board are not part of the evidentiary record for purposes of final award or this appeal. First, the parties did not agree or stipulate that the documents in question were part of the record for purposes of final award. Second, there is no showing the parties ever offered the documents into evidence within the terminal dates for submitting evidence at either a hearing before the Judge or at a deposition.

This Board has held on many occasions that parties should enter documents into the record either by stipulation or by offering them at a hearing or deposition. In that manner, all parties are given an opportunity to object to those documents or otherwise respond.

2. Did claimant sustain a new and separate accident on June 2, 1998, which arose out of and in the course of his employment with respondent, or were claimant's increased symptoms merely the natural and probable consequence of the July 1996 accident?

The greater weight of the evidence establishes that claimant sustained a new and separate accident on June 2, 1998.

Claimant's orthopedic surgeon, Dr. Lewonowski, first testified that he did not believe claimant's hardware was broken by the June 1998 shoveling incident.[2] Later, the doctor testified that claimant's pedicle fractured and the hardware from the July 1996 surgery most likely broke at the same time during the shoveling incident.[3] Nevertheless, the incident caused claimant's vertebra to compress causing the bony fragments within the L1-2 nonunion mass or pseudoarthrosis to indent the spinal cord. The doctor attributed the permanent worsening of claimant's bladder, bowel and sexual dysfunction to the accelerated pace at which the bone moved into claimant's spinal canal due to the shoveling incident.[4]

Dr. Philip R. Mills, who first examined claimant at the Judge's request, also provided inconsistent opinions about whether the pedicle fracture and the broken hardware occurred at the same time. Dr. Mills' April 30, 2003 report, which is attached as an exhibit to the doctor's November 2003 deposition, indicates the doctor concluded the pedicle fracture occurred during claimant's June 1998 shoveling incident. But the doctor testified he did not believe the pedicle fracture occurred on June 2, 1998, but that the hardware broke at that time.[5] In any event, Dr. Mills also testified that the fibrous tissue that comprised the pseudoarthrosis at L1-2 also tore in June 1998 when the hardware in claimant's back broke.[6] Because of the shoveling incident, the doctor believes claimant sustained additional injury and functional impairment.

And orthopedic surgeon Dr. Terrance C. Tisdale, who initially saw claimant at his attorney's request, also believes claimant probably fractured his pedicle and broke his hardware during the shoveling incident. According to Dr. Tisdale, the shoveling incident permanently aggravated claimant's back condition.[7]

Finally, orthopedic surgeon Dr. C. Reiff Brown, who evaluated claimant at Hartford's request, testified the June 1998 incident permanently aggravated and injured claimant's back.[8]

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[2] Lewonowski Depo. (Feb. 9, 2004) at 35.

[3] Lewonowski Depo. (Mar. 29, 2004) at 12.

[4] *Id.* at 45.

[5] Mills Depo. (Nov. 5, 2003) at 32, 34.

[6] *Id.* at 71.

[7] Tisdale Depo. at 20, 23.

[8] Brown Depo. at 42.

The evidence is clear claimant had a weakened back and a failed fusion as a result of the July 1996 accident. The evidence is also clear that but for the 1996 injury and attempted fusion, the June 1998 injury may not have occurred. Accordingly, Union argues the June 1998 incident and the second back surgery were natural and probable consequences of the 1996 accident and, therefore, should be the responsibility of Hartford. The Board disagrees as it finds claimant sustained a new and separate accident on June 2, 1998, which is the responsibility of Union.

In *Jackson*,[9] the Kansas Supreme Court held that every natural consequence that flows from an injury, including a new and distinct injury, is compensable under the Workers Compensation Act if it is a direct and natural result. But that general rule was clarified in *Stockman*,[10] which held that the *Jackson* rule did not apply when a worker sustained a new and separate accident:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.[11]

Whether an aggravation of a worker's condition has been caused by a natural and direct consequence of an initial injury or whether that aggravation has resulted due to a new and separate accident is a question of fact to be decided on a case-by-case basis. The evidence is overwhelming that the shoveling incident accelerated the failure of the hardware in claimant's back, which in turn caused the compression of claimant's vertebra and bone to move against claimant's spinal cord.

Union has produced substantial evidence that the June 1998 accident would not have occurred but for the July 1996 accident and claimant's first back surgery. And before the legislature modified the Workers Compensation Fund's liability for second-injury claims, that evidence would have prompted the Board to assess the entire liability for this claim against that Fund. But the Workers Compensation Fund is no longer responsible for second-injury claims. More importantly, whether or not a second injury results from an earlier injury does not determine whether the new injury results from a new and separate accident as opposed to being a natural and probable consequence of an earlier accident. In short, those are altogether different questions.

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[9] *Jackson v. Stevens Well Service,* 208 Kan. 637, 493 P.2d 264 (1972).

[10] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 505 P.2d 697 (1973).

[11] *Id.* at 263.

When considering the entire record, the Board finds claimant sustained a new and separate accident on June 2, 1998, for which claimant is entitled to receive workers compensation benefits from respondent and Union.

3. What injury and disability, if any, did claimant sustain as a result of the June 2, 1998 incident?

The record contains several expert medical opinions regarding claimant's increased injury and functional impairment following the June 1998 accident.

Dr. Mills, who last saw claimant in late April 2003, provided a final diagnosis of arthrodesis at L1-2 and L2-3 with Moss cage; chronic right lower extremity neurologic deficits with sensory loss, motor weakness and ankle clonus; neurogenic bowel and bladder difficulties and difficulties with erection; and chronic low back pain. According to Dr. Mills, claimant now has a 19 percent whole body functional impairment, five percent of which preexisted the June 1998 accident. Dr. Mills concluded claimant sustained an additional 14 percent whole body functional impairment (which represents an additional five percent impairment to the low back and a nine percent impairment for the loss of sexual function) due to the June 1998 accident. Moreover, Dr. Mills determined claimant was now realistically unemployable due to that accident.

On the other hand, Dr. Brown concluded claimant now has a 25 percent whole body functional impairment as a result of the June 1998 accident. The doctor equally apportioned that functional impairment rating between the July 1996 and June 1998 accidents. Dr. Brown recommended that claimant limit lifting to no more than 30 pounds occasionally, 15 pounds frequently, all lifting be done with good body mechanics, and permanently avoid frequent flexion and rotation greater than 30 degrees.

Dr. Lewonowski testified twice. But the doctor was not asked his opinion of claimant's functional impairment rating at either deposition.[12] The doctor, however, did testify that he agreed with Dr. Mills' opinion that claimant was now realistically and essentially unemployable.

Finally, Dr. Tisdale indicated claimant sustained a 12 percent whole body functional impairment following the July 1996 accident that increased to 13 percent following the June 1998 accident. Dr. Tisdale testified that claimant should be able to work by following the recommended restrictions as set forth in an early 2000 functional capacity evaluation.

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[12] Dr. Lewonowski's rating following the July 1996 accident is included in the documents introduced at Dr. Brown's deposition. But those documents were offered for only the limited purpose of demonstrating the information that Dr. Brown reviewed. Consequently, Dr. Lewonowski's functional impairment rating for claimant's 1996 accident cannot be considered. See Brown Depo. at 14.

The evidence is overwhelming that claimant permanently aggravated his back in the June 1998 accident and that he sustained additional functional impairment. As indicated above, the parties do not challenge the Judge's findings of permanent partial general disability and permanent total disability. The Board affirms those findings as it concludes claimant sustained permanent partial general disability and later permanent total disability as a direct result of the June 1998 accident.

Accordingly, claimant is entitled to receive disability benefits for a 32.5 percent permanent partial general disability for the period from March 24, 1999, through April 30, 1999, followed by a 50 percent permanent partial general disability from May 1, 1999, through January 2, 2000, followed by a 14 percent permanent partial general disability from January 3, 2000, through February 11, 2001, followed by a permanent total disability.

4. Should claimant's award be reduced due to a preexisting functional impairment under K.S.A. 1997 Supp. 44-501(c)?

When a worker's preexisting condition is permanently aggravated, the compensation awarded should be reduced by the amount of preexisting functional impairment.[13]

The evidence is overwhelming that claimant's June 1998 accident aggravated his low back. The evidence is also overwhelming that claimant had a preexisting impairment in his low back from his July 1996 injury and resulting low back surgery. Because of that accidental injury, claimant developed a footdrop that did not resolve. And following his release from medical treatment in June 1997, claimant intermittently used a TENS unit to control his pain. After the July 1996 accident, claimant never regained the ability to lift heavier weights and, more importantly, often fell when his leg gave way.

Considering claimant's symptoms immediately before the June 1998 accident, the Board finds Dr. Tisdale's opinion regarding claimant's preexisting functional impairment the most persuasive. Consequently, the Board finds that claimant had a 12 percent whole body functional impairment immediately before he sustained the June 1998 accident. Accordingly, claimant's award should be reduced by that amount.

5. Did the Judge err by ordering Union to reimburse Hartford for the medical expenses and temporary total disability benefits Hartford paid to claimant after the June 2, 1998 accident?

[13] K.S.A. 1997 Supp. 44-501(c).

In *Kimber*,[14] Ms. Kimber alleged she injured both hands and knees when she fell while working at U.S.D. No. 418. Kimber left that job in June 1991 and in December 1991 began working for Cedars. Kimber alleged she injured her wrists at Cedars from May 15, 1992, to October 5, 1992. Kimber filed claims against both employers and the cases were consolidated for trial.

Both the judge and this Board held Kimber had failed to prove she had suffered an accidental injury in the course of her employment with the school district. Both the judge and this Board held Kimber sustained a 20 percent permanent partial general disability due the injuries she sustained while working for Cedars. This Board, however, also ordered Cedars to reimburse U.S.D. No. 418 for the medical expense it paid that Kimber incurred after commencing employment with Cedars.

Cedars appealed the Board's decision to the Kansas Court of Appeals. The Kansas Court of Appeals modified the Board's decision and held that the Board erred in ordering the reimbursement of the medical expense that was incurred before May 15, 1992, which was the date selected by Kimber as the starting date of her alleged period of injury. But the Kansas Court of Appeals held the Board did not err by ordering Cedars to reimburse the school district the medical expense it paid that claimant incurred beginning May 15, 1992.

> We hold that Cedars is responsible to reimburse the school district for compensation and expenses arising after the injury which occurred at Cedars on May 15, 1992, and the days that followed. **Clearly, the school district and its insurance carrier should be reimbursed by Cedars for paying compensation and expenses owed by Cedars before the issue of liability was determined by the Board.**[15] (Emphasis added.)

In *Lott-Edwards*,[16] Ms. Edwards alleged three different accidents while employed by Americold. But each accident involved a different insurance carrier. In short, this Board ordered the insurance carrier on the last accident, Travelers, to reimburse the insurance carrier on the second accident, National Union, for any temporary total disability benefits and medical benefits that National Union had paid after Travelers' coverage commenced.

National Union appealed to the Kansas Court of Appeals and argued that the Board should have also ordered Travelers to reimburse National Union for those benefits National

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[14] *Kimber v. U.S.D. No. 418*, 24 Kan. App. 2d 280, 944 P.2d 169, *rev. denied* 263 Kan. 886 (1997).

[15] *Id.* at 283.

[16] *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000).

Union had paid before Travelers' coverage commenced. The Court of Appeals held the Board did not err.

The principal issue in this claim was whether claimant's June 1998 accident was a new and separate accident for which Union would be liable or a natural and probable consequence of claimant's July 1996 accident for which Hartford would be liable. After a preliminary hearing, the Judge ordered Hartford to provide claimant's temporary total disability and medical benefits. Now, however, after all the evidence has been presented both the Judge and this Board have determined that Union should be responsible for claimant's benefits. Consequently, Hartford shouldered Union's obligation during the preliminary stages of this claim. And, under *Kimber* and *Lott-Edwards*, Union is now required to reimburse Hartford for the benefits Hartford provided to claimant after the June 2, 1998 accident. And that reimbursement must be made before Union is entitled to receive any credit for monies previously paid by Hartford, as provided in the language of the award used below.

AWARD

WHEREFORE, the Board modifies the May 4, 2004 Award.

Thomas L. Remmenga, Jr., is granted compensation from Technical Irrigation Service and Union Insurance Company for a June 2, 1998 accident and resulting disability. Based upon an average weekly wage of $507.69, Mr. Remmenga is entitled to receive 42 weeks of temporary total disability benefits at $338.48 per week, or $14,216.16.

For the period from March 24, 1999, through April 30, 1999, Mr. Remmenga is entitled to receive 5.43 weeks of permanent partial general disability benefits at $338.48 per week, or $1,837.95, for a 32.5 percent permanent partial general disability.

For the period from May 1, 1999, through January 2, 2000, Mr. Remmenga is entitled to receive 35.29 weeks of permanent partial general disability benefits at $338.48 per week, or $11,944.96, for a 50 percent permanent partial general disability.

For the period from January 3, 2000, through February 11, 2001, Mr. Remmenga is entitled to receive 13.60 weeks of permanent partial general disability benefits at $338.48 per week, or $4,603.33, for a 14 percent permanent partial general disability.

Commencing February 12, 2001, Mr. Remmenga is entitled to receive 223.18 weeks of permanent total disability benefits at $338.48 per week, or $75,541.97, for a permanent total disability. The total award is $108,144.36, which has been reduced due to claimant's preexisting 12 percent whole body functional impairment.

As of August 31, 2004, Mr. Remmenga is entitled to receive 42 weeks of temporary total disability compensation at $338.48 per week in the sum of $14,216.16, plus 54.32 weeks of permanent partial general disability compensation at $338.48 per week in the sum of $18,386.23, plus 185.29 weeks of permanent total disability compensation at $338.48 per week in the sum of $62,716.96, for a total due and owing of $95,319.35, which is ordered paid in one lump sum, less any amounts Union previously paid. Thereafter, the remaining balance of $12,825.01 shall be paid at $338.48 per week until paid or until further order of the Director.

After Union reimburses Hartford for the payments it made after the June 2, 1998 incident, Union is entitled to a credit for the amounts Hartford previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of September 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Henry A. Goertz, Attorney for Claimant
Nathan Burghart, Attorney for Respondent and Union
Richard J. Liby, Attorney for Respondent and Hartford
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director